Qwest
607 14th Street, NW, Suite 950
Washington, DC 20005
Phone 202-429-3120
Facsimile 202-293-0561

Melissa E. Newman
Vice President – Federal Regulatory

Qwest®
Spirit of Service™

EX PARTE

Electronic Filing via ECFS

December 13, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311

Dear Ms. Dortch:

Qwest hereby submits the attached ex parte for inclusion on the record in the above-referenced proceeding.

Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachment

Copy via email to:
Donna Gregg (Donna.Gregg@fcc.gov)
Rosemary Harold (Rosemary.Harold@fcc.gov)
Holly Saurer (Holly.Saurer@fcc.gov)
John Norton (John.Norton@fcc.gov)
Brendan Murray (Brendan.Murray@fcc.gov)
Heather Dixon (Heather.Dixon@fcc.gov)
Rudy Brioche (Rudy.Brioche@fcc.gov)
Bruce Gottlieb (Bruce.Gottlieb@fcc.gov)
Ian Dillner (Ian.Dillner@fcc.gov)
Christina Pauze (Christina.Pauze@fcc.gov)
Samuel Feder (Sam.Feder@fcc.gov)
Matthew Berry (Matthew.Berry@fcc.gov)

Qwest
Spirit of Service

Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6650
Facsimile 303 896-1107

Robert B. McKenna
Associate General Counsel

EX PARTE

December 13, 2006

RE: *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311

As the Federal Communications Commission ("Commission") prepares to consider adopting rules interpreting some of the provisions of the Communications Act applicable to the franchising of cable television service, Qwest Communications International Inc. believes that the franchising process, as currently operational, poses very serious constitutional issues involving free speech and the First Amendment. Any rules adopted by the Commission should take proper account of the First Amendment.

This *ex parte* presentation analyzes very briefly the law and the Constitution as they apply in a single factual scenario: namely, the provision of video programming by carriers authorized by law to have communications facilities in the public right-of-way for purposes other than the provision of cable television service. Qwest Communications International Inc. speaks from its own experience as the parent company of an incumbent local exchange carrier ("ILEC") Qwest Corporation (collectively "Qwest") serving fourteen states. As a general rule, Qwest occupies local rights-of-way pursuant to state franchises, and local governments do not have the ability to prohibit Qwest from using these public rights-of-way.[1] Qwest uses these public rights-of-way to provide telecommunications services (*i.e.*, common carrier services). Qwest also uses these public rights-of-way to provide its own speech -- that is, to transmit to customers Qwest-provided and controlled information services.

In other words, Qwest currently occupies the public rights-of-way in most of its fourteen states pursuant to state-granted franchises, and lawfully uses the facilities that it has placed in these public rights-of-way to engage in the provision of constitutionally protected free speech.

---

[1] Qwest of course complies with local governmental rules regarding safety, timing of construction, and the like.

However, when Qwest desires to provide a specific type of constitutionally protected free speech over these facilities -- namely, cable television service[2] -- the cable television provisions of the Communications Act ostensibly require Qwest to obtain the prior permission from the local franchising authority ("LFA") before speaking.[3] The LFA's right to deny Qwest the authority to engage in this speech is bounded by a variety of ambiguous prohibitions such as the requirement that an LFA may not "unreasonably refuse to award an additional competitive franchise" and must allow any applicant for a franchise (not just an applicant to provide a competitive franchise) a "reasonable period of time" to complete construction.[4]

LFAs can and have used this authority to engage in prior restraint of free speech to prevent Qwest and other similarly situated carriers from exercising their First Amendment rights.

We submit that the local franchising process in these circumstances can meet Constitutional muster only if it is very tightly circumscribed by rigid standards designed to foster legitimate governmental interests in a manner that conforms to the principles that must govern any governmental speech regulation, especially one that actually imposes a prior prohibition against speech (which is the case with the franchise requirements). Any franchising process, including any new rules adopted in this docket, that does not meet the constitutional standards that apply whenever a governmental agency seeks to suppress constitutionally protected speech, would be in violation of the Constitution.

The principles involved are not difficult. Even in a franchising situation where use of the public right-of-way is not otherwise authorized (for example, in the case of a traditional cable operator seeking permission to install a cable system within the public right-of-way), governmental regulation of free speech must nevertheless be tied to a legitimate governmental objective and tailored in a fashion that is reasonably tailored to that objective.[5] Specifically, the basic rule for evaluating a content-neutral speech restriction is whether it "further[s] an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental

---

[2] Cable television service, unlike broadcast speech, is entitled to full protection of the First Amendment. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636-39 (1989).

[3] 47 U.S.C. § 541(b)(1). If video programming delivery were offered in a manner that made it an information service rather than a cable television facility, no such permission would be necessary. Qwest assumes arguendo for purposes of this analysis that the service involved is actually cable television service under the Act.

[4] 47 U.S.C. §§ 541(a)(1) and 541(a)(4)(A).

[5] We assume that this type of speech regulation would be evaluated under the so-called "intermediate scrutiny" test for "content neutral" regulation articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). This is not necessarily the case, as denial of a franchise to a carrier already occupying the public right-of-way in fact is a content-based denial because of the pre-existing right of the carrier to provide information services over the same facilities.

restrictions do not burden substantially more speech than is necessary to further those interests."[6] In the so-called "must carry" cases,[7] in which the cable industry challenged the statutory requirement that cable operators be required to dedicate a certain percentage of their channels to the use of local broadcasters, the statute was upheld in the face of constitutional challenge only because of an extensive record supporting the premise that the rules were reasonably related to the legitimate governmental interest of preserving over-the-air television broadcasting. A similar extensive record would be necessary to support a statute that enabled LFAs to deny cable operators the right to speak.

In this regard, whatever record exists to support the ability of an LFA to deny a cable operator the right to construct facilities in the public right-of-way, such a record is clearly absent in the case of an LFA's denial of the right to speak to a carrier already lawfully occupying the public right-of-way. In fact, given the right of such a carrier to offer information services over those facilities, there can be no legitimate governmental purpose to be served by permitting the LFA to prohibit one particular type of speech -- *i.e.*, cable television service.

Qwest has analyzed the "build-out" problem in its prior submissions in this docket.[8] Specifically, LFAs prohibit carriers such as Qwest from offering cable television service unless they commit to construct facilities and/or provide service to customers and/or areas selected by the LFA. To a very large extent these "build-out" obligations are supported and advocated by the incumbent franchisee in an effort to avoid having to face the rigors of competition, because the build-out commitments being demanded are not economically feasible for a second entrant.

While this use of the franchising process by incumbent cable operators to avoid competition is problematic in itself, in the First Amendment context it is disastrous. One of the purposes of the existing cable provisions of the Communications Act is to encourage competitive entry and cable television availability from a multiplicity of sources.[9] Thus, denial of the right of a carrier to use

---

[6] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. at 662, quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[7] *See Turner Broadcasting*, 512 U.S. 622; *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997).

[8] *See* Comments of Qwest Communications International Inc. filed Feb. 13, 2006 at 14-20; Reply Comments of Qwest Communications International Inc. filed Mar. 28, 2006 at 8-13 for a fuller recital of Qwest's position.

[9] *See, e.g., In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of ExclusiveContract Prohibition*, CS Docket No. 01-290, Report and Order, 17 FCC Rcd 12124, 12126-27 ¶¶ 6-7 (2002) ("Congress, in the 1992 Cable Act, was concerned that [] '. . . cable system[s] face[d] no local competition. . . .' The lack of competition to cable in the delivery of multichannel programming enabled cable operators to engage in anticompetitive behavior to the detriment of

its existing facilities and existing rights-of-way to provide a competitive voice in a community not only does not further a legitimate governmental interest, it directly contradicts the express purpose of the Act itself. Under these circumstances, it is difficult to imagine how continuation of the current franchising process, or Commission rules that permit denial of the right to provide cable service by common carriers already occupying the public right-of-way, can pass Constitutional muster.

As Qwest has pointed out in its earlier filings in this docket, the Commission should issue a binding interpretation of the Act to the effect that all build-out requirements imposed on second entrants by an LFA as a precondition to providing service are per se unreasonable under the Act. In the case of carriers already occupying the public right of way, Qwest submits that such requirements raise extremely serious constitutional issues as well.

Sincerely,

/s/ Robert B. McKenna

---

subscribers, nascent competitors, and non-affiliated programmers. Congress sought to address this concern . . . by imposing . . . obligations that it believed would increase competition to incumbent cable operators. . . . One means of increasing competition in the distribution of programming was to prohibit contractual exclusivity . . . in the sale of programming. . . Congress determined that this imbalance of power [that is, increased horizontal concentration of cable operators combined with extensive vertical integration] limited the development of competition among MVPDs and restricted consumer choice. . . ." [citations omitted]).